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No. 85-1216

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

JOHN D. O'CONNELL,
Petitioner,

v.

MARYLAND STEEL ERECTORS, INC., *et al.*,
Respondent.

REPLY BRIEF

William C. Burgy
ASHCRAFT & GEREL
2000 L Street, N.W., Suite 700
Washington, D.C. 20036
(202) 783-6400
Counsel for Petitioner

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In their Opposition to the Petition for a Writ of Certiorari, the respondents materially mischaracterize the question as being one of a statute of limitations. It is nothing of the sort, as the action herein was brought within the applicable period of limitations.

The substantive issue here is whether the Longshore Amendments of 1984, Pub. L. 98-426, 98 Stat. 1639 (1984), which adjust the rights of the employers and employees subject to the Act, are applicable also to the injuries governed by the District of Columbia extension of the Longshoremen's and Harbor Workers' Compensation Act. This disingenuous presentation of the issue as one involving the statute of limitations is made solely to disincline the Court to review the very significant and far-

reaching effects of the decision below. As will be demonstrated, the decision below is not only profoundly in error, but it also aids tortfeasors at the expense of employers and employees, whose rights against third-party tortfeasors were intended by Congress to be preserved.

I.

THE DECISION BELOW HAS BEEN SOUNDLY REJECTED BY AN UNPRECEDENTED AND EXTRAORDINARY COMMENT ENUNCIATED BY THE UNITED STATES DEPARTMENT OF LABOR, AND WILL NOT BE FOLLOWED IN COMPENSATION CLAIMS GOVERNED BY THE 1928 ACT

Contrary to the arguments of the respondents, the issues involved herein are of tremendous consequence. The court below which has no statutory authority whatsoever to hear cases governed by the federal act, has in effect held that the federal agencies and courts administering the 1928 Act are not to apply the current version of the applicable law. The United States Department of Labor, which administers the 1928 Act, has now formally declined to follow the decision of the court below. The thousands of cases still governed by the 1928 Act will be subject to the current version of the LHWCA, and the decision of the District of Columbia Court of Appeals in *O'Connell v. Maryland Steel Erectors, Inc.*, 495 A.2d 1134 (D.C. 1985) will not be followed. 20 C.F.R. § 701.101(b) (Feb. 3, 1986). In its comment rejecting the rationale of the court below, the Department explained the importance of the issue involved herein and the error of the court below:[1] The most critical portions of the regulations are contained in the addendum to the brief. The

[1]It is interesting to note that one of the *dissenting* justices below in the Petition for Rehearing En Banc, Associate Judge Rogers, had first hand knowledge concerning D.C. Council's purpose in enacting the D.C. Workmen's Compensation Act of 1979, D.C. Code § 36-301 *et seq.* (1982). Judge Rogers was at the time employed in the Office of the D.C. Corporation Counsel. She was the Corporation Counsel for the District of Columbia from 1979 to 1983.

regulations were published in their entirety in the Federal Register, Vol. 51, No. 22, Feb. 3, 1986, 4270-4273.

This extraordinary comment serves to underscore the importance of the issues involved in this case.[2]

This Court has held on numerous occasions that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that this is wrong. . . ." *Red Lion Broadcasting Company v. FCC*, 395 U.S. 367, 381 (1969); *New York Department of Employment Services v. Dublino*, 413 U.S. 405, 421 (1973); *Miller v. Youakim*, 440 U.S. 125, 144 (1979).

While this principle is most often applied when the courts are presented with questions concerning proper interpretation of a statutory provision within the agency's expertise, it has been applied in other contexts as well. In *Dublino*, for instance, this Court deferred to the United States Department of Labor's administrative conclusion that the Federal Work Incentive Program does not pre-empt state work programs. The legal issue presented in *Dublino* did not involve interpretation of a statutory term, but rather a broad question of law such as that presented here.

While the proper interpretation of the savings statute is a federal question which this Court must in the last analysis decide, certainly the United States Department of Labor's conclusion that the 1984 Amendments apply in the District is entitled to significant consideration and deference. The Department of Labor continues, even after the adoption of the New D.C. Act, to be the agency charged with administration of District claims brought pursuant to the Longshore Act. As such, it is

[2]The Department of Labor is unquestionably within its rights to decline to follow the decision of the court below. The judicial chain of command for the 1928 Act is federal rather than local. In fact, the court below, which declined to stay the case pending the decision of the federal circuit court, and instead ordered *expedited* arguments, abused its discretion in not recognizing the issue as one of uniquely federal law.

uniquely qualified to assess the chaos and unfairness that would occur were it forced to administer two entirely different versions of the Longshore Act. Because the savings statute was designed to apply in a very different context than that involved here, its rational interpretation for purposes of this case necessarily involves a consideration of the practical effects that the D.C. City Council and Congress could have anticipated when the New Act was allowed to become law and when the 1984 Lognshore Amendments were passed. Given the Department of Labor's unique ability to assess the effects of a holding that District claimants and employers are bound by, a legislatively discarded version of the Longshore Act, it is also in the best position to determine whether the absurd and anomalous effects of such an interpretation could possibly have been intended by the D.C. City Council or Congress. Therefore, this Court should defer to its logical and sensible interpretation of the savings statute and its assessment of the intent of the D.C. City Council and Congress.

Finally, the Department of Labor's conclusion that the 1984 Amendments are applicable in the District should be given substantial consideration because the Department of Labor is not an interested party, and because it reached its conclusion not only having had the opportunity to fully analyze the decision below in this case and the *O'Connell* decision, but also after a full consideration of all comments, including those presented by WMATA, on the interim regulations issued in January, 1985. 51 Fed. Reg. 4270, 4271.

II.

THE DEPARTMENT OF LABOR'S ANALYSIS OF THE ISSUE IS CORRECT, AND SHOULD BE ADOPTED BY THE COURT

Totally apart from the deference that should be given the Department of Labor's conclusion that the 1984 Amendments are applicable in the District, this Court should consider the analysis and arguments presented in the regulations on their merits, just as it would had the Department of Labor filed an *amicus* brief in this case. We believe that the clear and cogent explanation given for the Department of Labor's conclusion will add significantly to the Court's understanding of the issues, and will assist the Court in reaching its decision in this case.

While we do not propose to discuss the Department of Labor's (DOL) analysis in detail, we do believe that a brief summary of the primary points made, with specific reference to similar arguments made in our briefs, is appropriate. We enumerate these points below.

1. DOL points out that the local government and DOL have always been in agreement that the New D.C. Act was not intended to affect the operation of the Longshore Act with regard to pre-July 26, 1982 cases, that the District passed regulations to this effect, and that no one, prior to this litigation, challenged the proposition that the 1928 Act was *fully viable* for the class of cases it governs. 51 Fed. Reg. 4271. We make this point in Appellants' Brief at 14-18, 21-23 and our Reply Brief at 10-15.

2. DOL points out that a holding that the savings statute preserves only liabilities *accrued* at the time of the repeal would not explain a claimant's undisputed right to future benefits. DOL reasons, consistent with the language used in the savings statute, that it preserves all "*incurred*" liabilities, whether or not such liabilities are "*accrued*" or contingent, and that all liabilities, including those based on future amendments, are incurred as of the date of injury. Since the savings statute provides that a saved statute is to be treated as "still . . . . in force" for purpose of *all*

"incurred" liabilities, the clause of the 1928 Act providing that all subsequent amendments are applicable in the District operates to assure the applicability of the 1984 Longshore Amendments in the District. 51 Fed. Reg. at 4272. We make the identical point in Appellants' Brief at 23-28 and our Reply Brief at 16-18.

3. DOL also points out that the *O'Connell* Court erred in assuming that Congress intended the amendments to apply only in the maritime context. 51 Fed. Reg. at 4272. We make this point in Appellants Brief at 11-13, 18-21 and our Reply Brief at 6-9.

In summary, we believe that the Department of Labor's substantive arguments, while similar in many respects to arguments also presented by the appellants, are particularly well-expressed, and that the Court should therefore give these arguments substantial consideration.

III.

THE AMENDMENTS TO 33 U.S.C. § 933(b) ARE INTENDED TO DEPRIVE THESE TORTFEASORS FROM UTILIZING *RODRIGUEZ V. COMPASS SHIPPING COMPANY* AS A DEFENSE TO DEFEAT THE RIGHTS OF THE INJURED EMPLOYEE AND HIS EMPLOYER

At the time this civil action for negligence was filed in 1979, the undisputed law in the District of Columbia was *Potomac Electric Power Co. v. Wynn,* 120 U.S. App. D.C. 13, 343 F.2d 195 (D.C. 1965). Under that case, this action was properly brought and petitioner had standing to sue. Unquestionably the employer and its carrier had a statutory lien for benefits paid, and both employer and employee were protected under this arrangement. In 1981, this Court, in *Rodriguez v. Compass Shipping Co.,* 451 U.S. 596 (1981) overuled *Wynn* and held that the provisions of 33 U.S.C. § 933(b) must be strictly observed, and gave tortfeasors the opportunity to question the standing of injured workers to bring suit any time suit is brought after six

months following the receipt of benefits pursuant to a formal award of benefits. Unfortunately, *Rodriguez* has in practice wreaked havoc on employees and employers, while benefiting only third-party tortfeasors who have characterized the § 933(b) provision as being a "statute of limitations." The 1984 Amendments seek to rectify this unfortunate state of affairs, which have provided an unwanted boon for the wrongdoers which have caused injuries.

The new amendments simply return the *right* to bring a third-party action to the injured worker 90 days after entry of a formal award, or the effective date of the amendments, whichever is earlier. In this case, the cause of action became the property of the petitioner on December 28, 1984, while the matter was still *sub judice*. Since the case was pending, the intent of Congress should be effected, and the case should be remanded for trial. Only in that way can both the interests of the employee and employer be protected and the illegitimate purpose of the respondent tortfeasor be prevented.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari to the District of Columbia Court of Appeals be granted.

Respectfully submitted,

William C. Burgy
ASHCRAFT & GEREL
2000 L Street, N.W., Suite 700
Washington, D.C. 20036
(202) 783-6400
Counsel for Petitioner

DEPARTMENT OF LABOR
Employment Standards Administration
20 CFR Parts 701, 702 and 703
***

Scope of this Subchapter

The Interim Final Rules, at § 701.101, stated that these regulations (and by reference the 1984 Amendments) apply to the Longshore and Harbor Workers' Compensation Act (LHWCA) and its direct extensions, including the District of Columbia Workmen's Compensation Act of 1928 (DCCA, or the 1928 Act).

Several affected parties submitted comments asserting that the 1984 Amendments should have no application to cases that arose under the 1928 Act, which was "repealed" by the District of Columbia City Council in its own District of Columbia Workers' Compensation Act that became effective July 26, 1982 (the 1982 Act). Further, some courts considering the question in the context of the 1984 Amendments' changes in the incidents of injured workers' tort rights have found the 1984 Amendments inapplicable to cases arising under the repealed 1928 Act. The subject is of immediate concern in continuing litigation and administration of many cases arising out of pre-1982 employment injuries. The Department has determined that all concerned parties and tribunals could benefit from a further statement of the Department's construction of the interrelationship between the 1928 Act, the 1982 Act, and the 1984 Amendments. These final rules state that construction: that the 1928 Act is to be treated as still in effect, for all purposes (including application of the current version of the LHWCA according to its terms), in cases in which the employment event or events on which

the employment event or events on which the claim is predicated occurred before the new D.C. Act took effect.

Congress enacted the DCCA in 1928, in the exercise of its power to legislate generally for the District of Columbia. The DCCA provided simply that the Longshore and Harbor Workers' Compensation Act (LHWCA), enacted the previous year (44 Stat. 1424), "including all amendments that may hereafter be made thereto, shall apply" to private employment in the District. Pub. L. 419, 45 Stat. 600. In 1979, pursuant to authority conferred by Congress in the District of Columbia Self-Government and Governmental Reorganization Act of 1973, D.C. Code sections 1-102 to -295 (1981), the District of Columbia City Council and Mayor enacted the District of Columbia Workers' Compensation Act, the D.C. Law 3-77 (July 1, 1980), D.C. Code sections 36-301 to -344 (1981). After amendments extending its effective date, this act took effect on July 26, 1982. It contains no provision, other than that specifying its effective date, delimiting the class of cases to which it is applicable. It does contain a provision that the 1928 Act "is hereby repealed." *Id.* section 46, 27 D.C. Reg. 2503, 2541.

The local government and the United States Department of Labor, responsible for administration of the old law, were in full agreement that the new law did not disturb the operation of the old one with respect to pre-1982 cases, and the District of Columbia regulations promulgated under the new law limited its application to "injuries which occur on or after July 26, 1982." (Code of D.C. Reg. section 3602.1, 29 D.C. Reg. 5540 (Dec. 17, 1982)). No one then challenged the proposition that the 1928 Act was fully viable for purposes of applying the LHWCA to determine and enforce liabilities *continuing* to accrue for *post*-1982 medical services, disabilities, and survivorship related to

injuries arising out of employment before the new law took effect. Such continued applicability of the 1928 Act was assumed and stated without analysis by both the District of Columbia Court of Appeals (*Garrett v. Washington Air Compressor Co.*, 466 A.2d 464 n.1 (D.C. 1983); *Carey v. Crane Service Co.*, 457 A.2d 1102, 1102 n.2 (D.C. 1983)), and the federal Court of Appeals for the District of Columbia Circuit (*Crum v. General Adjustment Bureau*, 738 F.2d 474, 475 n.2 (D.C. Cir. 1984); *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 792 n.1 (D.C. Cir. 1984); *Stevenson v. Linens of the Week*, 688 F.2d 93, 95 n.1 (D.C. Cir. 1982)). Conversely, the local administrative authorities denied claims under the new law for post-1982 consequences of pre-1982 employment.

The LHWCA was amended on September 28, 1984. The Amendments have detailed effective-date provisions making many of their changes in the law applicable to future determinations of rights and liabilities based on *past* injuries and deaths, as well as those based on injuries occurring thereafter (*Id.* § 28, 98 Stat. 1655). The question whether these amendments to the LHWCA apply to liabilities under the 1928 Act has been presented in several contexts.

First, in *WMATA v. Johnson*, 104 S.Ct. 2827 (1984), the Supreme Court had interpreted sections 4(a), and 5(a) of the LHWCA as extending the tort immunity of an injured worker's employer to the "general contractor" to whom the immediate employer is a "subcontractor," under nearly all circumstances. Hence, the Washington Metropolitan Area Transit Authority (WMATA) was held immune to tort liability, based on its negligence, to injured employees of its subway-construction contractors. The cases that had been before the Supreme Court, many other pending tort suits against WMATA to which the *Johnson*

ruling applied, and still more suits against other "general contractors" similarly situated, were still pending (final judgments not yet having been entered) when the LHWCA Amendments of 1984 were enacted. The plaintiffs immediately relied upon the amendments to sections 4(a) and 5(a), which were expressly made applicable to pending cases as well as new ones (1984 Amendments section 28(a), 98 Stat. 1655) and were expressly intended to preclude any still-pending cases from dismissal on the basis of the *Johnson* decision. (Conference Report, H.R. Rep. No. 98-1027, at 24 (1984)). In cases arising under the LHWCA itself, this position was readily sustained, and dismissals under *WMATA* v. *Johnson* were reversed on the basis of the 1984 Amendments, *E.g., Louviere* v. *Marathon Oil Co.*, 755 F.2d 428 (5th Cir. 1985). In cases under the old DCCA, however, WMATA and other defendants asserted, inter alia, that the 1984 LHWCA Amendments could have no operation under the "repealed" 1928 Act. Although at least one judge of the U.S. District Court for the District of Columbia had apparently held that the *Johnson* decision was no longer the applicable law, *(Lehrer* v. *AFGO Engineering Corp., Civ.* No. 81-1593 (D.D.C. Oct. 10, 1984] (Gasch, J.) (unpublished order denying summary judgment for defendant), WMATA's position was accepted by Judge Pratt in *In re Metro Subway Accident Referral,* Misc. No. 82-306 (D.D.C. Dec. 18, 1984). The *Metro Subway* opinion "accept[ed] as a fact that the Congress in enacting the 1984 amendments intended the amendments to sections 4(a) and 5(a) of the [LHWCA] to apply to the District of Columbia and therefore to this litigation," but reasoned that "[t]he crucial question is not whether Congress possessed the power and had this intent, but whether the means it employed achieved this result." (*In re Metro Subway Accident Referral, supra,* Slip op. at 7). The court concluded that "[h]aving been repealed, the

1928 Act could not be affected by amendments to the [LHWCA]," and that the effect of the general saving statute, 1 U.S.C. 109, is only to "preserve . . . accrued rights and liabilities" that "exist[ed] at the time of the repeal." This decision has been appealed to the District of Columbia Circuit, which also has the issue before it in other indistinguishable cases.

The IFR, at § 701.101(b), provided that the new regulations (and, by implication, the amendments they embodied) would apply to old DCCA cases. This assertion has been challenged in comments on the interim final regulations, submitted on behalf of WMATA, in reliance on the *Metro Subway Accident Referral* opinion.

The applicability of the 1984 Amendments to old-DCCA cases was presented again in tort litigation in *O'Connell v. Maryland Steel Erectors, Inc.*, 495 A.2d 1134 (D.C. 1985). *O'Connell* involved the viability of an injured worker's tort suit against a negligent third party, where the suit was filed more than six months after entry of a formal award of compensation. Before the 1984 Amendments, LHWCA § 33(b) provided that, perhaps subject to rare exceptions based on conflicts of interest, the workers' right to sue was irrevocably assigned to the employer six months after an award; under the 1984 Amendments, the right reverts to the employee if the employer does not exercise it within 90 days. The court generally followed the reasoning of the *Metro Subway* decision in holding that because the injury was covered by the old DCCA rather than the LHWCA itself, the amendment was wholly inapplicable. It reasoned that because of its repeal in 1982 by the new DCCA, the old DCCA "had ceased to exist" and "was no longer on the books" before 1984, so that the Amendments "did not affect any rights created by [the] prior law." 495 A.2d at 1142. The court denied any deference to

the IFR at 701.101(b), on the ground that "provisions dealing with the jurisdiction of the courts are not within the province of an agency to interpret." *Id.* at 1144. And it determined that the 1984 Amendments were not "meant . . . to cover persons injured in purely land based occupations" and "affected only the maritime industry." *Id.*

Contrary to the reasoning *Metro Subway* and *O'Connell,* the proposition asserted in the IFR — that the LHWCA Amendments of 1984, insofar as they apply in terms to "pending claims," apply to such claims under the old DCCA — is both sound and, as a practical matter, strictly necessary. The "general saving statute," 1 U.S.C. 109, not only preserves "liabilit[ies] incurred" under a repealed statute, but further provides that for purposes of determining and enforcing such liabilities the repealed statutes "shall be treated as still remaining in force." Hence, as to the preserved claims and liabilities, the 1928 Act is "still . . . in force." The terms of the statute that is thus preserved for the relevant class of rights and liabilities (the 1928 Act) expressly make the LHWCA *as amended* applicable; and the LHWCA, as currently amended, includes provisions added in 1984 which are expressly applicable to claims arising out of employment before 1982 as much as to those arising after 1984.

The contrary view expressed in *In re Metro Subway Accident Referral, supra,* and *O'Connell, supra,* would appear to have consequences far beyond the inapplicability of the 1984 LHWCA Amendments to rights and liabilities under the 1928 Act. The statement that the saving statute preserves only "*accrued* rights and liabilities" existing at the time of the repeal," *In re Metro,* Slip op. at 10, would lead to legal and administrative chaos. The only rights and liabilities "accrued" under the 1928 Act as of July 26, 1982, were for medical services rendered by that date,

disability or survivor status continuing to that date, attorneys' services performed up to that date, and special fund assessments made up to that date. Thus, if only such "accrued" liabilities and rights were preserved for enforcement after that date, there would be no basis for the *continuing* accrual of rights and liabilities under the 1928 Act after its repeal, even in circumstances where the *employment events* on which the rights and liabilities are based occurred before then.

The Department of Labor, like all relevant judicial tribunals, the local District of Columbia administrators, and indeed all insurers and self-insurers responsible for payments up to now under the old DCCA, *have certainly assumed the contrary* — i.e., that what is preserved under the old DCCA is all rights and liabilities, whenever "accruing," arising out of *employment* events before July 26, 1982. The future liabilities resulting from those events, though contingent in duration and amount on future events (and hence neither "accrued" nor "vested"), were, in the language of the general saving statute, "incurred" by the employers or insurers at the time of the employment events. *O'Connell's* reasoning that the old DCCA "had ceased to exist" and "was no longer on the books" in 1984 is as inconsistent with the court's own application of the pre-1984 version of the LHWCA, through the 1928 Act, as it would be with application of the amended version. Pursuant to the general saving statute, the 1928 Act *remains in force* for all circumstances in which the employer's liabilities were "incurred" before its repeal, even if those liabilities had not yet accrued. The *O'Connell* court also erred in reasoning that Congress and the President intended the 1984 Amendments to apply only to maritime, not "purely land based," employment; even apart from the old DCCA, the Amendments certainly apply to entirely non-

maritime employment through the other statutory extensions of the LHWCA (see 20 CFR 701.101(a)).

Since the rights and liabilities preserved by the general saving statute included liabilities that were not "accrued" or "vested," but were *contingent* (even though already "incurred"), the application of new legislation readjusting some of those liabilities upwards and others downwards is entirely valid. It is clear that the District of Columbia government's intent and understanding when it enacted and implemented the 1982 Act was that the 1928 Act would remain fully in effect with respect to past *and future* liabilities deriving from pre-1982 employment events. It is equally clear that when Congress passed the 1984 LHWCA Amendments, it intended to readjust and to rebalance the rights and liabilities in *all* cases in which the LHWCA was the measure of those rights and liabilities.

In sum, the reasoning of the opinions in *In re Metro Subway Accident Referral* and *O'Connell* is unsound and would have extremely unfortunate consequences. The question should not be characterized as whether a repealed statute can be amended, but whether an incorporating statute which remains in effect as to a class of cases should apply the incorporated statute according to the latter's current terms. The 1928 Act remains in effect pursuant to the general saving statute, so as to apply the *current* version of the LHWCA (where its terms so provide), to determine liabilities resulting from employment events before July 26, 1982.

The IFR stated that the 1928 Act applies to "injuries or deaths sustained prior to July 26, 1982," when the new local legislation superseding the 1928 Act took effect. 20 CFR 701.101(b), 50 FR 391. This statement is substantially revised for clarity.

First, when an "injury [is] sustained" is ambiguous, and to the extent it is the appropriate standard it is defined differently for these purposes than for others. For example, if a worker whose leg was injured at work in 1980 falls while at home, because of the impaired leg, in 1984, that injury is "consequential" to the 1980 injury, and its consequences and sequellae are compensable based on their relationship to the earlier injury; yet the compensable consequential injury was "sustained" in 1984. It is not compensable under the new local legislation, and must reasonably be compensable under the old law. Further, the "injury" represented by an occupational disease is not considered for other purposers to "occur," or to be "sustained," until it causes symptoms; but for the purpose of determining whether a workers' compensation statute *applies* to such an injury ("coverage"), the relevant legal provisions are those in effect at the time of the *employment exposure* to the conditions that cause the disease. Finally, coverage of a *death* claim does not turn on when "death [is] sustained." The LHWCA itself, for example, until its shoreward extension in 1972, covered only employment afloat; it was never applied to cases of death *after* the 1972 amendments, related to employment events *before* 1972 in *shoreside* longshoring or shipyard work. See generally *Stark* v. *Bethlehem Steel Corp.*, 10 BRBS 350, 353-354 (1979); *Verderane* v. *Jacksonville Shipyards, Inc.*, 14 BRBS 220.15, 223-224 (1981); *id.* at 228 (concurrence); *id.* at 231 (dissent). Similarly, a death in 1985 resulting from a 1981 employment injury will not be within the coverage of the local DCCA that took effect in 1982, any more than an occupational disease becoming manifest in 1985, arising out of employment exposure before 1982.

Workers' compensation laws operate upon the employment relationship. The occurrence of an event or events in

the course of that relationship is the foundation of any compensation-law liabilities that arise thereafter. The insurance requirement that is a socially and practically critical aspect of compensation legislation attaches to the *conduct* of *covered employment*. The strictly standardized form of compensation insurance policy defines the liabilities covered by a policy for a specified term, as all those arising out of *employment* during the policy's term, regardless of when the liabilities arise. Hence a policy issued to a District of Columbia employer under the 1928 Act for the year 1981 will cover the employer's liability, *under the old law* (including any statutory amendments to that law that are applicable to the case), for a 1985 death related to *employment* in 1981; but the employer's 1985 insurance policy (if the employer is still in business), under the new law, will not include such liability.

Thus, highly unsettling consequences would follow if the distinction between 1928-Act and 1982-Act cases were different from the distinction between what is covered under old-DCCA insurance policies and what is covered on new-DCCA policies. Insurers would be relieved of liabilities they contracted to bear, and either some cases that would otherwise be compensable would not be or the liabilities in those cases, if under the 1982 Act, would be uninsured and would fall on the employers themselves even though they were continuously insured under one law or the other.

The courts that have included footnotes in their opinions explaining their continued application of the old DCCA in the case before them after its repeal have stated a variety of bases – that "events in this case occurred prior to the passage of" the 1982 Act, (*Carey* v. *Crane Service Co.*, 457 A.2d 1102, 1103 n.2 (D.C. 1983) (employee's tort suit)), or that "all of the pertinent events occurred

before [its] effective date," (*Garrett* v. *Washington Air Compressor Co.*, 466 A.2d 462, 462 n.1 (D.C. 1983) (same)), or that the "injury and claim occurred" before repeal, (*Stevenson* v. *Linens of the Week*, 688 F.2d 93, 95 n.1 (D.C. Cir. 1982) (review of old-DCCA award)) or that the "claim arose before the enactment" of the repeal, (*Crum* v. *General Adjustment Bureau*, 738 F.2d 474, 475 n.2 (D.C. Cir. 1984) (same)), or that "the claim was filed before the effective date" of the repeal. (*Carter* v. *Director, OWCP*, 751 F.2d 1398, 1399 n.1 (D.C. Cir. 1985) (same)). None of these statements was the result of consideration and resolution of a disagreement between the parties, nor would the different standard here promulgated have changed the results. It is appropriate to preserve the applicability of the 1928 Act for *all* liabilities arising out of *employment* before its repeal. The general saving statute, 1 U.S.C. 109, may be seen to support this analysis. It preserves any "liability incurred" under a statute before its repeal. The liability of an employer under a workers' compensation statute is "incurred" at the time of its conduct of the employment out of which a disabling injury arises, even though such liability may not even begin to *accrue* until later.

ALJ decisions issued under the 1928 Act, as well as decisions issued by the District of Columbia under the 1982 Act, have concluded that disabilities resulting from employment events that occurred prior to July 26, 1982, are subject to the provisions of the 1928 Act even though such disabilities did not become manifest until after the 1982 Act became effective. *Coward* v. *Peter Kiewit & Sons, Inc.*, OALJ Nos. 85-DCW-38 to -40 (Aug. 30, 1985) (1928 Act); *Pryor* v. *James McHugh Construction Co.*, OALJ No. 85-LHC-114 (Sept. 9, 1985) (1928 Act); *Jones* v. *PEPCO*, H&AS No. 83-182 (Oct. 23, 1985) (1982 Act).

Accordingly, these final rules revise § 701.101(b) to state that the old law applies, not to "injuries or deaths sustained" before its repeal, but to "all claims based on *employment events* before July 26, 1982."